(1) 95-1575

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

$184,505.01 IN U.S. CURRENCY, REGINALD D. MCGLORY,

Claimant-Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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56pp

QUESTIONS PRESENTED

1. Whether a writ of certiorari should be granted to resolve the conflict between the circuits over whether forfeitures pursuant to 21 U.S.C. § 881(a)(6) constitute punishment for purposes of double jeopardy and due process analysis.

2. Whether a writ of certiorari should be granted to resolve the conflict between the circuits over whether the fact that all forfeitures pursuant to 21 U.S.C. § 881(a) require proof of different elements from the crimes with which the defendant is charged—such as the fact that the property at issue was related to a criminal sale or exchange—means that such forfeitures are not based on the "same offense" as the criminal charges for purposes of double jeopardy analysis.

3. Whether a writ of certiorari should be issued to determine an important question relating to forfeitures and double jeopardy—whether a defendant is required personally to appear in a forfeiture proceeding which forfeits his property to the government in order for him to claim in a subsequent proceeding that that forfeiture constituted a prior jeopardy.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Reginald McGlory respectfully prays that a writ of certiorari issue to review that portion of a judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the United States District Court for the Western District of Pennsylvania denying a motion by petitioner McGlory to reopen a default judgment previously entered by that court forfeiting $184,505.01 of Mr. McGlory's property to the government.

OPINIONS BELOW

The decision of the Court of Appeals is officially reported at 72 F3d 1160 (3d Cir. 1995). A copy of the decision is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1995.

The Court's jurisdiction is invoked pursuant to Title 28, United States Code, 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment of the United States Constitution states in relevant part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .

21 U.S.C. § 881(a)(6) states in relevant part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys. negotiable Instruments. securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

On September 8, 1989, Pittsburgh police and agents of the Drug Enforcement Administration searched three locations—petitioner McGlory's home at 236 South Negley Avenue in Pittsburgh; the home of his wife, Sandra McGlory, at 285 Suncrest Drive in Verona and the home of his mother, Ola McGlory, at 4267 Bryn Mawr Road in Pittsburgh—seizing a large number of items and arresting Mr. McGlory on drug charges (A120)[1].

Mr. McGlory was subsequently indicted on October 4, 1989. *United States* v, *McGlory*, 89 Cr. 144 (W.D.Pa). After the government obtained a superseding indictment naming other co-defendants on December 13, 1989, the trial in the criminal case commenced on April 23, 1990.[2]

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[1] References preceded by "A" are to the appendix filed in the Third Circuit Court of Appeals; references preceded by "BA" are to the documents attached to appellant's brief to the Third Circuit; references preceded by "SSA" are to the documents attached to appellant's reply brief to the Third Circuit.

[2] Petitioner McGlory's subsequent conviction was affirmed by the Third Circuit in *United States* v. *McGlory*, 968 F.2d 309 (3d Cir. 1992).

Meanwhile, the government divided up the property it had seized into 26 separate forfeiture proceedings—*United States* v. *$184,505.01 In U.S. Currency*, 89 Civ. 2323 (W.D.Pa.); *United States* v. *1988 Mazda RX7 Convertible*, 90 Civ.126 (W.D.Pa.); *United States* v. *Nine Framed Paintings*, 90 Civ. 136 (W.D.Pa.); *United States* v. *Nine Framed Paintings*, 90 Civ. 137 (W.D.Pa.); *United States* v. *One Toshiba Color Television, Two Answering Machines and One Health Tech Computer*, 90 Civ.138 (W.D.Pa.); *United States* v. *$14,548.50 In U.S. Currency*, 90 Civ. 236 (W.D.Pa.); *United States* v. *One Marble Indian Statue, et al.*, 90 Civ. 369 (W.D.Pa.); *United States* v. *Assorted Jewelry*, 90 Civ. 370 (W.D.Pa.); see also Drug Enforcement Administration administrative forfeiture proceedings ## 65613, 65615, 66651, 67065, 64582, 65323, 68735, 73402, 65313, 68730, 68719, 68727, 64563, 68740, 68729, 52425, 68743 and 72090.

It then proceeded to commence each of these proceedings on a separate date during the period just before Mr. McGlory's criminal trial.

One of these forfeiture proceedings—*United States* v. *$184,505.01 In U.S. Currency*—is the subject of the present petition. The government commenced *United States* v. *$184,505.01 In U.S. Currency* by filing a complaint for forfeiture on November 21, 1989 (A007, A017). In that complaint, the government acknowledged that the property in question had been seized from petitioner McGlory and that the government was seeking its forfeiture on the basis of Mr. McGlory's alleged drug activities (A017-018).

Mr. McGlory filed a claim of ownership in this proceeding, asserting that the property in question belonged to him. When the government did not receive an answer to the complaint[3],

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[3] The government served the complaint on claimant McGlory via his attorney in the criminal proceedings, Thomas Ceraso, who was at that time overwhelmed with the preparations for the upcoming criminal trial (A040, A051-052). When Ceraso did not respond initially, the government obtained a default judgment on March 26, 1990 (A008 (docket sheet)). Shortly thereafter, on April 24, 1990, Ceraso filed a claim of

however, it moved, and the court granted, an order of forfeiture on April 12, 1991 (A009, A023).

On April 15, 1994, petitioner McGlory filed a *pro se* motion to set aside the default (A049). In that motion, Mr. McGlory explained that he had a meritorious defense to the forfeiture in that he had inherited the money in question from his grandmother (A056-058, A065-066). He also stated that he had only learned of the default recently, and that it had been his understanding that this proceeding had been stayed during the criminal trial and never reactivated (A052, A054, A067-068). He also alleged that his attorney, Ceraso, was supposed to represent him in this forfeiture proceeding (A051), and that simultaneous preparation for both the criminal trial and this civil proceeding would have been impossible (A55). He further alleged that Ceraso had suffered from a conflict of interest in that he had represented one of the principal government witnesses against Mr. McGlory in his criminal trial, and that as a result of this conflict and Ceraso's other omissions, he had failed to provide Mr. McGlory with adequate representation in this forfeiture proceeding (A055, A059, A062, A067-068).

The government opposed Mr. McGlory's motion, claiming *inter alia* that the government had not been required to litigate this action as part of McGlory's criminal case[4]. It also

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ownership on behalf of McGlory and a motion to set aside the default (A008, A051-052).

After that motion was granted, the government sought and obtained several extensions of time to complete discovery and take claimant McGlory's deposition (A008 (docket sheet)). Then, on January 31, 1992, without doing anything further concerning either discovery or deposition, the government filed a motion seeking an order compelling claimant McGlory to answer the complaint, which the district court issued on February 11, 1991 (A009). When Mr. McGlory's attorney failed to file an answer, the government sought and obtained its default judgment.

[4] See the United States' Response in opposition to Claimant's Motion to Set Aside Entry of Default Judgment in 89 Civ. 2323 at paragraph 8. This document is included in the record on appeal in 94-3528.

alleged *inter alia* that Rule 60(b) of the Federal Rules of Civil procedure (under which McGlory had brought his motion to set aside the default judgment) did not apply to *in rem* forfeiture proceedings (A080) and that McGlory would not be able to prove his allegations of a meritorious defense at a trial (A084-085). On August 10, 1994, the district court entered an order denying petitioner McGlory's motion "for the reasons articulated in the United States' Brief in Opposition" (BA10).

Petitioner McGlory's appeal to the United States Court of Appeals for the Third Circuit in this matter was consolidated with his appeals in two other civil forfeiture matters—*United States* v. *$14,548.50 In U.S. Currency*, 90 Civ. 236 and *United States* v. *One Marble Indian Statue, et al.*, 90 Civ. 369.

On December 29, 1995, the Third Circuit rendered a decision reversing the district court's orders in the other two cases on the ground that Mr. McGlory's constitutional right to due process had been violated by the government's failure to serve him with proper notice of those proceedings. *United States* v. *$184,505.01 in U.S. Currency*, 72 F.3d 1160, 1163-65 (3d Cir. 1995)[5].

The Third Circuit, however, affirmed the district court's order denying petitioner McGlory's motion to reopen the default judgement in *United States* v. *$184,505.01 in U.S. Currency*. Despite the fact that the judgment in this matter was entered after the entry not only of the judgment in Mr. McGlory's criminal case but also of the forfeitures in all of other forfeiture proceedings which the government had brought against Mr. McGlory's property, the Third Circuit nevertheless held that it did not violate his Fifth Amendment rights. *United States* v. *$184,505.01 in U.S. Currency*, supra, 72 F.3d at 1165 et seq.

The panel based its ruling primarily on its belief that forfeitures under 21 U.S.C. § 811(a)(6) do not constitute a separate "punishment" within the meaning of the Double

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5 The Third Circuit's decision is attached hereto as Appendix A.

Jeopardy Clause. Id. at 1165-70. In so holding, the panel conceded that it was placing itself in direct conflict with the position taken by the United States Court of Appeals for the Ninth Circuit that such forfeitures do constitute a separate punishment:

> In so holding, we reject the contrary reasoning and conclusion of the Ninth Circuit regarding § 881(a)(6) in *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), [cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996).]

United States v. *$184,505.01 in U.S. Currency*, supra, 72 F.3d at 1169.

The panel also held that although the forfeitures were all based on Mr. McGlory's alleged (and unspecified) drug activities, they nevertheless were not predicated on the "same offense" as required for double jeopardy analysis under the *Blockberger/Dixon* test, since, according to the panel, each forfeiture involved a different element—to wit, a different piece of property. It also maintained that the forfeitures were not the same offense as the criminal charges, since each required proof of different elements. Id. at 1169-70. In so holding, the panel implicitly conceded that it was placing itself in conflict with the position taken by both the Ninth Circuit and the Sixth Circuit in *United States* v. *$405,089.23 U.S. Currency*, *supra*, and *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996), respectively.

Finally, the panel held that even if Mr. McGlory had been punished by the earlier forfeitures, he could not claim to have been put in jeopardy by those proceedings since he had not appeared in them. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1167-68.

REASONS FOR GRANTING THE WRIT

POINT I

A. WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER WHETHER FORFEITURES PURSUANT TO 21 U.S.C. § 881(a)(6) CONSTITUTE PUNISHMENT FOR PURPOSES OF DOUBLE JEOPARDY AND DUE PROCESS ANALYSIS.

The United States Attorney for the Western District of Pennsylvania, in addition to bringing criminal charges against petitioner McGlory, also instituted no less than twenty-six separate forfeiture proceedings against different items of Mr. McGlory's property. The property at issue in this proceeding was the last of those forfeitures to be finalized, after all of the other twenty-five forfeitures had been completed and the judgment in the criminal case had been entered.

Petitioner McGlory respectfully submits that these facts alone make this case the very epitome of the multiple jeopardy which the Fifth Amendment was designed to prevent. The Third Circuit, however, held that these circumstances did not constitute multiple jeopardy at all. In order to reach that conclusion, the Circuit took the position that forfeitures of an individual's property under 21 U.S.C. § 881(a)(6) can never constitute punishment within the meaning of the Double Jeopardy Clause. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1168-69.

In so ruling, the Third Circuit acknowledged that it was placing itself in direct conflict with the position which the Ninth Circuit has taken on this issue in cases such as *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996). *United States* v. *$184,505.01 In U. S. Currency*, *supra*, at 1169.

The Third Circuit's holding on this issue is also in direct conflict with the position taken by the Tenth and Seventh Circuits in *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, Nos. 94-1285 etc., (10th Cir. February 5, 1996), 58 CrL 1449 (February 21, 1996), and *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) respectively. On the other hand, it is consistent with the Fifth Circuit's decision in *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994).

Thus, at present, there appear to be at least three Circuits holding that forfeitures under 21 U.S.C. § 881(a)(6) are punishment, and at least two other Circuits holding that they are not. This is therefore a clear conflict between the Circuits which needs to be resolved by the Court.

The Court has already granted certiorari in the Ninth Circuit case. *United States* v. *$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, ___ U.S. ___, 116 S.Ct. 762 (January 12, 1996). Petitioner McGlory's case, however, has additional considerations, such as the fact that the government brought twenty-six separate forfeiture proceedings in addition to the criminal proceedings, which make it a more compelling violation of the prohibition against double jeopardy than the circumstances in the Ninth Circuit case. Moreover, the Court may not reach the question of whether forfeitures under § 881(a)(6) constitute punishment for purposes of double jeopardy analysis in the Ninth Circuit case. This case also raises a Due Process claim which is not presented in the Ninth Circuit case. (see infra at p. 15). Consequently, petitioner McGlory respectfully urges the Court to grant a writ of certiorari in this case to assure resolution of the conflict between the Circuits on this important issue.

The Third Circuit's position on this issue is clearly incorrect—the forfeiture of the property at issue here did constitute a multiple punishment vis-a-vis the previous judgment in the criminal case and the other previous forfeitures. The government concedes that all of the forfeited items at issue in all of the twenty-six forfeitures were seized from the same per-

son—petitioner McGlory—on the same day—September 8, 1989. Moreover, the government claimed to have the right to forfeit all of these items to itself based on the same allegation—that petitioner McGlory had been involved in the same illegal drug activity. Nevertheless, instead of seeking forfeiture of these items as part of the criminal proceedings which the government had initiated against petitioner McGlory, the government instead saw fit to divide these items up into twenty-six separate forfeiture proceedings. It then compounded that impropriety by initiating each of these forfeiture proceedings on a separate day during the period immediately preceding the commencement of the trial in petitioner's criminal case. The result was obvious—even if petitioner and his attorney had been properly served with notice (which they were not as to many of the forfeitures, see eg. *United States* v. *$184,505.01 In U. S. Currency*, *supra*, at 1163-64), they could not possibly have managed this barrage of litigation at the same time that they were preparing for a lengthy multi-defendant criminal trial. This is quite possibly the very reason why the government proceeded in this fashion.

Petitioner McGlory maintains that these forfeiture proceedings should have been part of his criminal proceeding (A35-36, A39-40, A48, A122), and that the government improperly used these forfeiture proceedings to impose additional "punishment" on him (A147). The government insists, however, that "the United States was not required to litigate the forfeiture matters during the criminal trial" and that "the criminal trial of the [sic] McGlory and the forfeiture proceedings are two different matters"(A152)[6].

In fact, the government is wrong. According to this Court, forfeitures which are not merely remedial but which also serve, at least in part, a "retributive or deterrent" purpose, are punishment for purposes of constitutional analyses. *United*

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[6] See also the United States' Response in opposition to Claimant's Motion to Set Aside Entry of Default Judgment in 89 Civ. 2323 at paragraph 8. This document is included in the record on appeal in 94-3528.

States v. *Halper*, 490 U.S. 435, 448 (1989); *Austin* v. *United States*, ___ U.S. ___, 113 S.Ct. 2801, 2806 (1993). More specifically, the Court has held that forfeitures which are sought on the basis of alleged criminal activity, and in particular, forfeitures which are sought under 21 U.S.C. § 881(a), are at least partly retributive or deterrent. *Austin* v. *United States*, *supra*, at 2810, 2814. Consequently, if the government secures such forfeitures in separate proceedings rather than as part of the underlying criminal proceeding, they constitute additional punishments for the same crime in violation of the Constitution's double jeopardy proscription. See *Department of Revenue of Montana* v. *Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994); *Austin* v. *United States*, ___ U.S. ___, *supra*, 113 S.Ct. at 2812; *United States* v. *Halper*, *supra*, 490 U.S. at 448.

Under the Court's decisions in *Halper*, *Austin* and *Kurth Ranch*, there can be no serious doubt that the forfeitures at issue here are subject to double jeopardy restrictions. Indeed, it is difficult to imagine a clearer example of what the double jeopardy clause was designed to prevent.

In this trilogy of cases, the Court formulated the rules to be applied by the lower courts in determining when "civil" procedures are to be considered punitive for purposes of constitutional protections. According to the Court, the rule to be applied depends largely on the nature of the statute being addressed. In *Halper*, the Court held that where the statute in question is a "fixed-penalty provision," the courts should employ a case-by-case analysis to determine whether the application of that fixed-penalty to a particular defendant results in a payment which is so disproportionate to the government's expenses in the case that the sanction constitutes a punishment (*Id.* at 1902).

In *Austin*, on the other hand, the Court held that where the case involves a forfeiture statute—specifically, the same 21 U.S.C. § 881(a) which is at issue here—the court should focus instead on the forfeiture statute "as a whole." (*Id.* at 2812 fn. 14).

The Court justified this different rule for forfeiture statutes because (1) forfeitures have historically been regarded as at least partly punitive and (2) they are by their nature not fixed, but rather vary dramatically from case to case. *Id.* at 2812 fn. 14; See also *United States* v. *$405,089.23 U.S. Currency*, *supra*, 33 F.3d at 1220; David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 12.10 at 12-131 (1993)[7].

A short time later, in *Kurth Ranch*, the Court reaffirmed and extended this "statute as a whole" analysis by applying it to a tax provision in *Kurth Ranch*.

As the Court explained in these cases, fixed penalty provisions are almost always remedial; the occasions on which they will be so disproportionate as to take on the characteristics of a punishment will be "rare." *United States* v. *Halper*, *supra*, 490 U.S. at 449. Forfeitures, on the other hand, particularly in light of their traditional role as punishment, will almost always be at least partly punitive. *United States* v. *Austin*, *supra*, 113 S.Ct. at 2806-2810, 2812 fn.14; see also Smith, *Prosecution and Defense of Forfeiture Cases*, *supra*, ¶ 12.10 at 12-126-127.

Instead of following the Court's holding in *Austin*, the Third Circuit (like the Fifth Circuit in *Tilley*) incorrectly applied *Halper*'s analysis for fixed-penalty provisions to this case. What the Third Circuit overlooked in doing so is what the Court made clear in *Austin*—that 18 U.S.C. § 881(a) is not a fixed-penalty provision, but rather a variable forfeiture provision. As such it is clearly governed by the "statute as a whole" analysis which the Court applied to it in the *Austin* decision.

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[7] As Smith explains in *Prosecution and Defense of Forfeiture Cases*, *supra*, ¶ 12.10, "[w]hereas the *Halper* Court focused on whether the sanction, *as applied in the individual case*, serves the goals of punishment, the *Austin* Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole" (emphasis in the original).

Although *Austin* involved subsections (4) and (7) of 21 U.S.C. § 881(a), whereas this case involves subsection (6) of that statute, all three of the "statute as a whole" considerations which the Court found to establish that the forfeiture was punitive in *Austin* are equally applicable here. The first factor on which the Court relied was the fact that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." (*Id.*, 113 S.Ct. at 2810). This traditional role of forfeitures as punishment is just as applicable to forfeitures under subsection (6) as it is to forfeitures under subsections (4) and (7).

The second factor cited by the *Austin* Court was that subsections (4) and (7) focus on "the culpability of the owner" as evidenced *inter alia* by the fact that they expressly provide an " 'innocent owner defense" (*Id.*, 113 S.Ct. at 2810-2811). Subsection (6) likewise focuses on the culpability of the owner and contains an innocent owner defense.

The third factor which the Court held to be relevant in *Austin* was the fact that "Congress has chosen to tie forfeitures directly to the commission of drug offenses" (*Id.* at 2811). This, according to the Court, established that Congress understood the forfeiture provisions as "serving to deter and punish" (*Id.*, 113 S.Ct. at 2811, 2812). Again, this connection between forfeitures and the commission of drug offenses is equally as true of forfeitures under subsection (6) as it is of forfeitures under subsections (4) and (7).

Consequently, applying the analysis established by the Court in *Austin*, forfeitures under subsection (6), like forfeitures under subsections (4) and (7), are clearly at least partly punitive and therefore subject to double jeopardy restraints. Indeed, it was the existence of these common characteristics shared by the various subsections of § 881(a) which led Justice Scalia in his concurrence in *Austin* to indicate that all forfeitures under § 881(a) are at least partly punitive:

> Statutory forfeitures under § 881(a) are certainly *payment* (in kind) *to a sovereign* as *punishment* for an *offense*.

Id., 113 S.Ct. at 2814; Justice Scalia, concurring (emphasis in the original)

These shared characteristics also led the Ninth and Tenth Circuits specifically to conclude that the double jeopardy clause is applicable to forfeitures under subsection (6). See eg. *United States* v. *$405,089.23 In U.S. Currency*, *supra*, 33 F.3d at 1221; *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*. Petitioner respectfully submits that the position of those Circuits on this issue is clearly correct and should be followed by this Court.

Perhaps because it was decided before *Kurth Ranch* and *$405,089.23 In U.S. Currency*, the *Tilley* case on which the Third Circuit relies so heavily for this issue, makes the fundamental error of assuming that *Austin* is not applicable to subsection (6) forfeitures. In order to reach this conclusion, it erroneously reverts to a *Halper*-type proportionality analysis. Thus, it insists that forfeiture of drug proceeds is solely remedial because it will always be "roughly proportional to the harm inflicted upon government and society by the drug sale" (*Id.*, 18 F.3d at 300).

That is not what remedial means, however, at least not in the context of double jeopardy analysis. Virtually every time that a judge imposes a punishment for criminal activity, he seeks a penalty which is "roughly proportional to the harm inflicted upon government and society" by the crime involved. That is the very essence of retribution.

In that sense, every punishment is remedial. But clearly, that sort of remediation does not serve to exempt all punishments from double jeopardy considerations. If it did, it would altogether eviscerate the Constitution's double jeopardy protection. Rather, in the double jeopardy context, the Court, first in *Austin* and later in *Kurth Ranch*, expressly limited the term "remedial" to situations where the statute was specifi-

cally designed for the sole purpose of reimbursing the "government's actual costs." *Austin* v. *United States*, *supra*, 113 S.Ct. at 2812 fn.14; see also *Kurth Ranch*, *supra*, 114 S.Ct. at 1944-1945.

Moreover, in *Austin*, the Court noted that unlike fixed penalty provisions, any relationship between the forfeiture of instrumentalities and the Government's actual costs in any given case would be, at most, "coincidental" (*United States* v. *Austin*, *supra*, 113 S.Ct. at 2812 fn.14). The same is true of the forfeiture of proceeds. Although one could reason that the amount of proceeds which might be seized in any given case would occasionally (but by no means always) happen to be roughly proportional to the government's actual costs, the same could also be assumed with regard to instrumentalities—the value of the instrumentalities seized would sometimes (but not always) be roughly proportional to the government's actual costs. Given their clearly punitive role, however, the speculative possibility of such occasional "rough proportionality" was not enough to take the forfeitures in *Austin* out of the realm of punishment. It is likewise not sufficient to take the forfeitures here out of that category.

Likewise, with regard to both instrumentalities and proceeds, the property actually available to be seized in any given case would vary widely depending on such idiosyncrasies as the book-keeping methods, spending habits and even the individual tastes of the individuals involved. It would even vary widely depending on the date that any seizure took place and what monies and/or instrumentalities happened to be on hand at that time. It is therefore clear that the "dramatic" variation which the Supreme Court found with regard to instrumentalities in *Austin* is equally true of the alleged proceeds at issue here.

Just from a common sense standpoint, the government cannot credibly claim that its taking of virtually all of petitioner McGlory's property—his clothing, statues, jewelry, appliances and money—was not done at least in part as punishment, retribution or deterrence. If the government had

pursued these punitive goals in a single proceeding, it might not have run afoul of constitutional protections. By choosing instead to proceed in the fragmented fashion that it did in these cases, however, the government clearly violated the constitutional prohibition against subjecting an individual to multiple jeopardies for the same offense.

In addition to violating the Double Jeopardy Clause, the successive proceedings at issue here were also unconstitutional for another reason—because they violated Due Process protections:

> successive trials arising from . . . the same criminal transaction may violate an accused's right to due process in the form of his right to be free of prosecutorial attempts to wear out the accused by a multitude of cases with accumulated trials.

United States v. *One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 fn. 10 (9th Cir. 1994), quoting from *Tucker* v. *Makowski*, 883 F.2d 877, 880-881 (10th Cir. 1989) See also *Sanchez* v. *United States*, 341 F.2d 225, 229 (9th Cir. 1965) ("planned exposure of an accused to a succession of trials for offenses clearly subject to joinder . . . may well constitute fundamental unfairness.").

Where the government has improperly exacted multiple punishments for the same offense, only the first judgment is permitted to stand. *Department of Revenue* v. *Kurth Ranch*, *supra*, 114 S.Ct. at 1946-1947. Since the government here obtained the forfeitures in the other twenty-five proceedings and the judgment in the criminal proceeding before obtaining the forfeiture in this proceeding, this last judgment clearly constitutes a multiple jeopardy.

The government could have brought this forfeiture proceeding as part of its criminal case. It chose not to do so. It is difficult to see what purpose—other than harassment of the defendant—was served by fragmenting the items seized into the multiple proceedings at issue here. Whatever the government's motives, however, that fragmentation clearly vio-

lated petitioner McGlory's double jeopardy protections under the federal constitution. Consequently, the judgment in *United States* v. *$184,505.01 In U.S. Currency* should be set aside.

POINT II

A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER WHETHER THE FACT THAT ALL FORFEITURES PURSUANT TO 21 U.S.C. § 881(a) REQUIRE PROOF OF DIFFERENT ELEMENTS FROM THE CRIMES WITH WHICH THE DEFENDANT IS CHARGED—SUCH AS THE FACT THAT THE PROPERTY AT ISSUE WAS RELATED TO A CRIMINAL SALE OR EXCHANGE—MEANS THAT SUCH FORFEITURES ARE NOT BASED ON THE "SAME OFFENSE" AS THE CRIMINAL CHARGES FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS.

Two members of the Third Circuit panel also held that the circumstances here did not constitute multiple jeopardy for a second reason—because they believed that the forfeiture somehow was not predicated on the same offense as any of the earlier forfeitures or the criminal conviction. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1169. Consequently, those two judges reasoned, it did not satisfy the "same elements" test established by this Court in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) and *United States* v. *Dixon*, ___ U.S. ___, 113 S.Ct. 2849 (1993). Chief Judge Sloviter declined to join in this section of the opinion. *United States* v. *$184,505.01 in U.S. Currency*, *supra*, 72 F.3d at 1171 fn. 19.

This argument was never even raised by the government, presumably because it did not feel that the argument had any merit.

By imposing this interpretation upon the "same elements" test, these two judges placed the Third Circuit in direct con-

flict with the position which has been taken by the Seventh, Ninth and Tenth Circuits in *United States* v. *Torres*, *supra*, *United States* v. *$405,089.23 U.S. Currency*, *supra*, and *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*, respectively. In fact, even the Fifth Circuit's decision in *Tilley* on which the rest of the Third Circuit's decision in this case relies so heavily did not go this far. The holding of the two judges on this matter is apparently unsupported by any other Circuit.

The holding of these two judges on this issue is clearly incorrect. All of the judicial forfeiture complaints involving Mr. McGlory's property were identically worded. All specifically stated that the forfeiture were based, like the criminal proceedings, on petitioner McGlory's alleged drug activities (A012, A015, A018).

As such, these forfeiture proceedings clearly satisfied the "same elements" test which this Court has applied double jeopardy cases. *United States* v. *Dixon*, *supra*; *Blockburger* v. *United States*, *supra*.

As the Tenth Circuit explained in rejecting the Third Circuit's misinterpretation of the "same offense" rule when it was raised by the government in *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May)*, *supra*, that misinterpretation is based on the premise that the forfeiture statute, 21 U.S.C. § 881(a)(6) defines a separate offense. In fact, however, it clearly does not; rather, it defines a punishment.

Even if it did define a separate offense, however, the government clearly violates Double Jeopardy protections by pursuing it as here in a separate proceeding. If a separate offense is created, then it is one which consists of two elements—the underlying drug offense and the relationship of the property in question to that offense. As such, the drug offense would be a lesser included offense of the forfeiture "offense" and therefore could not properly be prosecuted and punished in a separate proceeding. See eg. *Harris* v. *Oklahoma*, 433 U.S. 682, 682 (1977).

More fundamentally, however, the opinion of the two Third Circuit judges on this matter clearly applies the same offense test "at too abstract a level." *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*. Where, as in the case of § 881(a)(6) forfeitures, the commission of one of a certain class of drug offenses is a necessary element of the forfeiture "offense", and where the same conduct or unit of prosecution is the factual basis of both, each offense within that class of drug offenses is a "species of lesser-included offense" in relation to the forfeiture "offense". *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*; see also *Illinois* v. *Vitale*, 447 U.S. 410, 420 (1980). Here, clearly, the drug offenses of which Mr. McGlory had previously been convicted, and on which the previous forfeitures were all based, constituted a "species of lesser-included offense" vis-a-vis the forfeiture "offense" involving the $184,505.01. Separate prosecution of the forfeiture "offense" was therefore clearly barred under the Double Jeopardy clause. *United States* v. *Titan Court, Unit 9, Littleton, Colo. (May), supra*.

The holding of the two Third Circuit judges regarding the "same offense" rule is clearly a misinterpretation of that rule, which conflicts with the holding of every other Circuit which has addressed this issue. Petitioner McGlory therefore respectfully asks the Court to grant certiorari so as to correct this misinterpretation and resolve this conflict between the Circuits.

POINT III

A WRIT OF CERTIORARI SHOULD BE ISSUED TO DETERMINE AN IMPORTANT QUESTION RELATING TO FORFEITURES AND DOUBLE JEOPARDY—WHETHER A DEFENDANT IS REQUIRED PERSONALLY TO APPEAR IN A FORFEITURE PROCEEDING WHICH FORFEITS HIS PROPERTY TO THE GOVERNMENT IN ORDER FOR HIM TO CLAIM IN A SUBSEQUENT PROCEEDING THAT THAT FORFEITURE CONSTITUTED A PRIOR JEOPARDY.

The Third Circuit's decision in this case also raises another issue which is both important and recurrent in forfeiture litigation, and therefore appropriate for this Court to address—whether an individual whose property is being forfeited to the government must actually participate in those proceedings in order to claim that they constituted a jeopardy as to him for purposes of double jeopardy analysis.

The Third Circuit's holding that he must do so is actually *dicta* in the circumstances of this case. Mr. McGlory was clearly placed in jeopardy by his criminal proceedings. Moreover, the government concedes that Mr. McGlory did file a claim in the subsequent $184,505.01 forfeiture proceeding which is at issue here. Consequently, whether any of the other prior forfeitures in which he did not participate also constituted a prior jeopardy is really irrelevant—the criminal conviction alone clearly satisfied that requirement.

Petitioner McGlory respectfully submits, however, that the Third Circuit is clearly wrong in holding that an individual does not suffer jeopardy when his property is forfeited to the government unless he enters an appearance in the forfeiture proceeding. If the property is his, and taken for that reason, then regardless of whether he appeared in that forfeiture action he has clearly been punished—and punishment is one of the fundamental forms of jeopardy recognized by this Court.

The Third Circuit's position on this issue is incorrect, first of all, because here as in most forfeiture proceedings under § 881(a), the government has conceded that petitioner McGlory is the owner of the forfeited property in its own prior pleadings. As previously explained, the government stated in the complaints that initiated these forfeiture proceedings that the property in question had been seized from petitioner McGlory. It further stated that it was seeking forfeiture of this property on the basis of petitioner McGlory's alleged illegal activities. Furthermore, it expressly identified McGlory as the "owner" of the property in some of the administrative forfeiture notices which it prepared pertaining to this property (See eg. SSA 15). It also took the position at petitioner McGlory's criminal trial that the seized property belonged to petitioner McGlory and constituted evidence of his alleged drug activities (see eg. SSA 17-18).

Consequently, it cannot now reasonably claim that merely because petitioner did not file a claim in the forfeiture proceedings asserting that ownership, he is barred from maintaining that the government's forfeiture of this property constituted a jeopardy for purposes of the double jeopardy clause. Such an about-face is clearly prohibited by the doctrine of judicial estoppel. As this and the Circuit courts have recognized:

> . . . the well-established doctrine, sometimes referred to as "judicial estoppel" . . . precludes a litigant from leading a court to find one way in one proceeding and then, because his interests have changed, leading the court to find another way in a subsequent proceeding.

Sperling v. *United States*, 692 F.2d 223, 228-229 (2d Cir. 1982) (concurring opinion[8]) See also *Teledyne Industries Inc.* v. *N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1165-1167 (4th Cir. 1982); *Scararo* v.

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[8] Although the quoted passage is from the concurring opinion in *Sperling*, it was expressly adopted by, and made part of, the court's opinion (*Id.*, 692 F.2d at 224 fn*).

Central R.R., 203 F.2d 510, 513 (3d Cir. 1953). The government simply cannot claim in both the initial forfeiture proceedings and the criminal trial that this property belonged to petitioner McGlory and then turn around and insist now that it did not.

These circumstances also place this case in stark contrast to *United States* v. *Torres*, 28 F.3d 1463 (7th Cir. 1994), the case on which the Third Circuit relies. In that case, the property at issue was money which Torres and one Olivares had produced to pay for drugs. There was no evidence that the money belonged to Torres as opposed to Olivares or even some third party on whose behalf they were making the purchase. Moreover, unlike in this case, the government never claimed that the money belonged to Torres or that he had earned it through his drug activities. Given these circumstances, the Seventh Circuit found that in the absence of any claim of ownership by Torres

> we have no reason to believe that he owned or had any interest in the money . . . Perhaps he was just a courier, making the buy on behalf of an undisclosed principal. If Torres lacked an interest in the cash, its forfeiture did not impose any penalty on him . . . (*Id.*, 28 F.3d at 1465).

Here, to the contrary, the position which the government took in the original forfeiture proceedings and in the criminal trial has left no doubt that as far as the government was concerned, petitioner McGlory was the owner of this property.

The Third Circuit's position—that petitioner McGlory was required expressly to assert ownership of the property in question in the civil proceedings in order to be entitled to claim that this forfeiture constituted a jeopardy—also runs contrary to the Fifth Amendment's protection against self-incrimination. By rushing these separate forfeiture proceedings forward prior to petitioner's criminal trial, the government clearly sought to put petitioner McGlory in an impossible position—either personally enter a claim of own-

ership of the property and thereby provide the government with an admission which it could then use against him in his criminal trial, or else supposedly lose not only the property but also the double jeopardy protection to which the government's taking of that property entitled him. In effect, the government is insisting that petitioner McGlory is not entitled to both the Fifth Amendment right against self-incrimination and the Fifth Amendment right against double jeopardy. To the contrary, he clearly is—it is well established that a defendant cannot be forced to make such an intolerable choice between two important constitutional rights. See eg. *Simmons* v. *United States*, 390 U.S. 377 (1968).

In addition, the Third Circuit's position on this matter is inconsistent with the Court's holding in *United States* v. *Austin*, *supra*, 113 S.Ct. at 2810, that "statutory *in rem* forfeiture in particular historically ha[s] been understood, at least in part, as punishment." Since the Court obviously was not talking about punishment of the named defendant (which in *in rem* proceedings is the property itself) it was clearly referring to punishment of the individual whose conduct was cited as the basis for the forfeiture—in this case petitioner McGlory. The punitive nature of *in rem* forfeitures thus is inherent in the proceeding itself and is not dependent, as the Third Circuit seems to believe, on whether the individual being punished happened to file a claim.

It is therefore clear that for double jeopardy purposes the issue here is not whether petitioner went through the formality of filing a claim in the civil proceedings, but whether the government maintained that the property was his and then proceeded to take over its ownership on that basis. Since it did, the government is judicially estopped from claiming that this property did not belong to petitioner McGlory, or that its taking of that property from him did not constitute a "jeopardy" for purposes of double jeopardy analysis.

This is particularly so since it was the government, by electing to bring the twenty-six separate forfeiture proceedings that it did in this case, which virtually assured that peti-

tioner McGlory would not be able effectively to defend in all of these proceedings, especially at the same time as he was preparing for a twenty-seventh proceeding—his criminal trial. The government also insured that result by failing to provide petitioner McGlory with adequate notice of the judicial proceedings so that he could enter his appearance in them. That being the case, the government should not be permitted to benefit from its own improprieties by now claiming that because petitioner did not enter those proceedings, he derives no double jeopardy protection from the government's taking of his property.

The Court should be aware that The Third Circuit itself is divided on this matter. Thus, in *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995), Judge Sarokin, dissenting, took the position that it was not necessary for a defendant whose property was forfeited to the government to actually participate in the forfeiture proceeding in order to claim that it constituted a prior jeopardy.

Since this issue is clearly of vital importance to many proceedings involving forfeitures, petitioner McGlory respectfully submits that it constitutes yet another reason why a writ of certiorari should be granted by the Court to review the proceedings in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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Filed December 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3528

UNITED STATES OF AMERICA

v.

$184,505.01 IN U.S. CURRENCY

Reginald D. McGlory,
Claimant-Appellant

No. 94-3674

UNITED STATES OF AMERICA

v.

$14,548.50 IN U.S. CURRENCY

Reginald D. McGlory,
Claimant-Appellant

No. 94-3675

UNITED STATES OF AMERICA

v.

ONE MARBLE INDIAN STATUE, ONE REPLICA
REMINGTON RATTLESNAKE STATUE

Reginald D. McGlory,
Claimant-Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Nos. 89-Civ-2323, 90-Civ-236, and 90-Civ-369)

Argued September 13, 1995

Before: SLOVITER, *Chief Judge*, ALITO, *Circuit Judge*, and RENDELL, *District Judge**

(Opinion Filed: December 29, 1995)

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OPINION OF THE COURT

ALITO, *Circuit Judge*:

In these appeals, Reginald D. McGlory challenges the district court's refusal to set aside default judgments in

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*The Honorable Marjorie O. Rendell, District Judge for the Eastern District of Pennsylvania, sitting by designation.

three separate civil *in rem* forfeiture proceedings brought under 21 U.S.C. § 881(a)(6).[1] McGlory raises five separate issues — lack of notice, double jeopardy, wrong standard in refusing to set aside default judgments, insufficient reasons for refusing to set aside default judgment, and misstatement or fraud on the part of the government. Because we find that the government violated McGlory's due process rights by failing to provide him with adequate notice of two of the proceedings, we reverse the district court's judgments in those proceedings. However, we reject McGlory's double jeopardy argument and therefore affirm the district court's judgment in the remaining proceeding. We also reject McGlory's remaining arguments.

I.

On September 8, 1989, as part of a criminal investigation of McGlory, federal Drug Enforcement Administration ("DEA") and Internal Revenue Service ("IRS") agents executed a search warrant at 4265-67 Bryn Mawr Road in Pittsburgh. Among other things, the agents seized the items that are the subject of the three proceedings on appeal: $14,584.50 in cash ("$14K");[2] three statues;[3] and an

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1. The provision states in relevant part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> • • •
>
> (6) *All moneys*, negotiable instruments, securities, or other things of value *furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange*, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6) (emphases added).

2. *United States v. $14,548.50 in U.S. Currency* (No. 94-3674).

3. *United States v. One Marble Indian Statue, One Replica Remington Rattlesnake Statue* (No. 94-3675).

apparently separate collection of $184,505.01 in cash ("$184K").[4] The agents also arrested McGlory. He was eventually convicted of conspiracy to distribute heroin and to possess heroin with the intent to distribute it, in violation of 21 U.S.C. §846; possession of heroin with intent to distribute, in violation of 21 U.S.C. §§841(a)(1), (b)(1)(C); possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1); using a firearm in a drug trafficking operation, in violation of 18 U.S.C. §924(c)(1); and laundering drug proceeds, in violation of 18 U.S.C. §1956(a)(1)(A)(i) and 18 U.S.C. §2. *See United States v. McGlory*, 968 F.2d 309, 314-15 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1388 (1993).

The DEA began separate administrative forfeiture proceedings against the $14K and the statues.[5] McGlory, who was incarcerated, received notice of both proceedings in prison, Supplemental Appendix ("Supp. App.")[6] at 60, 23, but filed no administrative claims in either proceeding. *Id.* Upon the filing of administrative claims by Sandra McGlory (McGlory's wife) and Ola Mae McGlory (his mother) to the $14K and the statues, respectively, Supp. App. 52, 55, 60, 23, the DEA referred the forfeitures to the United States Attorney, who filed complaints for civil forfeiture on February 7, 1990 (for the $14K) and February 28, 1990 (for the statues).

The government served McGlory with the complaints via first class and certified mail at the Bryn Mawr Road address, where his mother signed both certified mail receipts. Supp. App. 43, 213-16, 4. In her affidavit, McGlory's mother claimed not to remember receiving the notices but stated that she would have turned any such notices over to the attorney who was representing McGlory

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4. *United States v. $184,505.01 in U.S. Currency* (No. 94-3528).

5. The DEA referred the forfeiture of the $184K to the United States Attorney for judicial forfeiture, because its value exceeded $100,000, the maximum allowable amount for the less cumbersome administrative forfeiture process. App. 77.

6. As used in this opinion, Appendix ("App.") and Supplemental Appendix ("Supp. App.") refer to the appendices submitted by McGlory and the government, respectively.

on the criminal charges, Thomas Ceraso, Esq. Appendix ("App.") at 117. The government did not serve McGlory in prison, and made no attempt to do so.

McGlory did not file any claim or answer in either proceeding. App. 1-6, 27, 31, and the district court entered default judgments against him on May 29, 1990, and July 23, 1990, forfeiting the $14K and the statues, respectively. App. 21-22. McGlory filed motions to set aside the default judgments on April 21, 1994. App. 34,43. After referring the matter to a magistrate judge, who recommended that the default judgments not be reopened, the district court denied McGlory's motions. App. 3, 9.

The government filed a complaint for civil forfeiture of the $184K on November 21, 1989. App. 7, 17. The government served the complaint on McGlory via first class and certified mail at the Bryn Mawr Road address, as well as on Mr. Ceraso. Supp. App. 19. When McGlory again failed to file any claim or answer, the government obtained a default judgment. Supp. App. 99, 111. On McGlory's behalf, Mr. Ceraso then filed a claim of ownership and a motion to set aside the entry of default, which the government did not oppose, and the court set aside the judgment. Supp. App. 102-110, 112. McGlory again failed to file an answer within the time allotted by the court, and the court entered another default judgment against him on April 12, 1991. Supp. App. 129, App. 23. On July 15, 1994, McGlory filed a motion to set aside this second default judgment, which the district court denied.

II.

McGlory first argues that his due process rights were violated in that the government failed to provide him with adequate notice of the civil forfeiture proceedings against the $14K and the statues. Relying primarily on the Supreme Court's decision in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), McGlory argues that Due Process Clause required that the government serve him with notice of the forfeiture proceedings in prison.[7]

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7. McGlory also denies that he resided at the Bryn Mawr Road address prior to his arrest, claiming that the house at that address was his

By virtue of 28 U.S.C. §2461, civil *in rem* forfeiture proceedings are governed by Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. As the government notes, Rule C(4) requires only publication, not personal service of process. However, for due process purposes, publication alone is not sufficient when the government can reasonably ascertain the names and addresses of interested parties. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

McGlory argues, in our view persuasively, that *Robinson* and *Adams* together required that the government at least make an attempt to serve him with notice of the forfeiture proceedings in prison. In most important respects, *Robinson* appears indistinguishable from the present case. In *Robinson*,

> the State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address since he was at that very time confined in . . . jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was "reasonably calculated" to apprise appellant of the pendency of the forfeiture proceedings.

Robinson, 409 U.S. at 40 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also United States v. Woodall*, 12 F.3d 791, 794 (8th Cir. 1993) (when government knows of party's actual whereabouts, due process requires sending of notice to that address, especially where party is incarcerated); *accord United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995).

The government's counterarguments are unavailing. The government cites Rule C(4) to show that it had no statutory duty to inform McGlory, but this argument is not dispositive for due process purposes. Equally unpersuasive

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mother's home. McGlory Br. at 6, 9-11. The government points to extensive evidence that McGlory did in fact reside at 4265-67 Bryn Mawr Road. Gov't Br. at 7 n.1. Because we conclude that the government should have served (or at least attempted to serve) McGlory in prison, we need not resolve this dispute concerning McGlory's pre-arrest address.

is the *actual notice of the administrative forfeiture* proceedings that McGlory received while he was in prison, since the judicial forfeiture proceedings were separate proceedings from the administrative actions.

The government also claims that its actions satisfied the *Mullane* standard, and attempts to distinguish *Robinson* by noting that the defendant in *Robinson* did not receive notice of the proceeding until after it had concluded, whereas McGlory had actual notice of the proceedings from two sources: the notice of the administrative proceedings and the notice of the civil proceedings received by his attorney from McGlory's mother. As noted above, we do not find the notice of the administrative proceedings that McGlory received while in prison to be significant for purposes of the subsequent judicial proceedings. Furthermore, the government's arguments concerning the notice received by McGlory's attorney are flawed.[8]

The government, citing *United States v. Indoor Cultivation Equipment*, 55 F.3d 1311 (7th Cir. 1995), argues that the receipt of notice by McGlory's attorney constituted actual notice to McGlory. However, *Indoor Cultivation Equipment* and the case it cited, *United States v. Di Mucci*, 879 F.2d 1488, 1495 (7th Cir. 1989), involved situations where the litigation had already begun and the party's attorney had received notice of an important fact or deadline but had failed to act on it. The important Supreme Court cases in this area, *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), and *Smith v. Ayer*, 101 U.S. 320 (1879), also involved such situations, as opposed to initial service of process on a defendant.

The situation presented here — where the proceedings had not yet begun, McGlory was therefore not yet a party,[9]

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8. The parties dispute whether there is sufficient evidence to support a finding that McGlory's attorney in the criminal case, Thomas Ceraso, Esq., received the notices of the civil forfeiture proceedings from McGlory's mother. There seems to be strong evidence that he did receive the notices, including Mrs. McGlory's affidavit, App. 123. For purposes of this analysis, we assume that Mr. Ceraso received actual notice of the proceedings.

9. Indeed, with regard to McGlory's double jeopardy argument, see Part IV *infra*, the government claims that McGlory was never a party to the first forfeiture proceeding.

and Mr. Ceraso was not yet his attorney *in these proceedings* — is easily distinguishable from that in *Indoor Cultivation* and the other cases cited above. Plainly stated, for purposes of the civil forfeiture proceedings against the $14K and the statues, McGlory did not have an attorney at the time process was received by Mr. Ceraso; hence, service on Mr. Ceraso was not service on McGlory's attorney, and this could not constitute actual notice to McGlory.[10]

III.

McGlory next argues that the forfeitures in Nos. 94-3675 (statues) and 94-3528 ($184K) should be set aside as multiple punishments imposed on him for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment because they came after the forfeiture of the $14K in No. 94-3674 and (in the case of the $184K) after McGlory's criminal conviction.[11] According to McGlory, this

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10. Cases construing Rule 4 of the Federal Rules of Civil Procedure highlight the distinctiveness of service of process. Rule 4(d)(3) permits service upon an individual "by delivery of a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(d)(3). When the agent is the individual's attorney, numerous courts have held that the validity of service of process upon the attorney depends upon actual authority on the part of the attorney to receive process on behalf of the individual. *See, e.g., Schultz v. Schultz*, 436 F.2d 635, 639 (7th Cir. 1971) (service upon attorney was ineffective where attorney had not been appointed for that precise task); *Schwarz v. Thomas*, 222 F.2d 305 (D.C. Cir. 1955) (attorney representing defendant in another litigation has no authority to accept service of process in a separate suit); *Select Creations, Inc. v. Paliafito America, Inc.*, 830 F. Supp. 1223, 1234 (E.D. Wis. 1993) and cases cited.

11. The following chronology is relevant to this discussion:

(1) *No. 94-3674 ($14K)*
Complaint filed: February 7, 1990
Jeopardy attached: Never (*see* Part III.B *infra*)
Default judgment entered: May 30, 1990

(2) *No. 94-3675 (statues)*
Complaint filed: February 28, 1990

result is compelled by the Supreme Court's decisions in *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).[12]

McGlory's double jeopardy argument fails on several grounds. First, because he never filed a claim in the proceeding against the $14K or the proceeding against the statues, he was never "in jeopardy" in those proceedings. Second, none of the forfeitures constituted "punishment" within the meaning of the Double Jeopardy Clause. Finally, none of the proceedings were based on the "same offense."

A.

The Double Jeopardy Clause of the Fifth Amendment provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This clause also applies to imprisonment and monetary penalties, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), and it has been held to protect against "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440.

In three decisions issued in the last six years, the Supreme Court has held that, in certain circumstances,

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Jeopardy attached: Never (*see* Part III.B *infra*)
Default judgment entered: July 24, 1990

(3) *Criminal conviction*
Superseding indictment filed: December 13, 1989
Jeopardy attached: April 25, 1990
Judgment of conviction and sentence: February 12, 1991

(4) *No. 94-3528 ($184K)*
Complaint filed: November 21, 1989
Jeopardy attached: No earlier than May 4, 1990, when McGlory was made a party (*see* footnote XX *infra*).
Default judgment entered: April 12, 1991

12. McGlory did not raise his double jeopardy argument in the district court. Hence, the alleged constitutional violation is reviewable only for plain error. *United States v. Olano*, 113 S. Ct. 1770 (1993).

constitutional limitations that had previously been thought to apply only to criminal sanctions also serve to limit the imposition of civil sanctions. In *United States v. Halper*, 490 U.S. 435 (1989), the Court extended double jeopardy limitations to civil penalties that are not solely remedial in purpose, holding that "under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49. The defendant in *Halper* had previously been convicted for 65 counts of violating the criminal false claims statute, 18 U.S.C. § 287, by filing false Medicare claims totalling less than $600. He was then sued by the government under the civil False Claims Act, 31 U.S.C. §§ 3729-3731, which prescribed a $2,000 civil penalty per violation. Based on the record of the prior criminal prosecution, the district court granted summary judgment for the government on the issue of liability, but the court held that the imposition of the full civil penalties prescribed by the statute would violate the prohibition against double jeopardy. On direct appeal, the Supreme Court agreed that the statutory penalty as applied to Halper violated double jeopardy. The Court held that the civil penalty constituted punishment because in this "rare case" the civil penalty bore "no rational relationship to the goal of compensating the Government for its loss, but rather appear[ed] to qualify as 'punishment' in the plain sense of the word." 490 U.S. at 449. The Court remanded the case to the district court to determine the size of the civil sanction that the government could receive without crossing the line between remedy and punishment. *Id.* at 450.

In *Austin v. United States*, 113 S. Ct. 2801 (1993), the Court considered two other forfeiture provisions of the Controlled Substances Act, 21 U.S.C. §§ 881(a)(4) and 881(a)(7), which provide for the forfeiture of, respectively, conveyances and real property used or intended for use in illegal drug-related activities. 21 U.S.C. §§ 881(a)(4), (a)(7). Drawing on "the historical understanding of forfeiture as punishment," *Austin*, 113 S.Ct. at 2810, on the language of §§ 881(a)(4) and (a)(7), and on the legislative history of

§ 881, the Court found that forfeiture under §§ 881(a)(4) and (a)(7) does not solely serve a remedial purpose and hence must be considered "punishment" under *Halper*. As such, the Court concluded, forfeitures under §§ 881(a)(4) and (a)(7) are subject to the limitations of the Eighth Amendment's Excessive Fines Clause. *Id.* at 2812.

In so holding, the *Austin* Court rejected two arguments offered by the government in an attempt to show that §§ 881(a)(4) and (a)(7) are remedial and not punitive. First, the Court rejected the government's characterization of the conveyances and real property covered by the two sections as "instruments" of the drug trade, forfeiture of which could be considered remedial. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984). Second, the Court rejected the government's attempt to liken such forfeitures to those involved in customs violations, which serve as "a reasonable form of liquidated damages," *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972), that compensate for the costs imposed by illegal drug activity on the government and on society as a whole. "[T]he dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7)," the Court concluded, "undercut any similar argument with respect to those provisions." *Austin*, 409 U.S. at 2812.

Most recently, in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court held that the imposition of a tax under Montana's Dangerous Drug Tax Act after the taxpayer had already been punished in a separate criminal proceeding represented a second "punishment" for the same offense in violation of the Double Jeopardy Clause. While noting the holding of *Halper* that the Double Jeopardy Clause prevents a defendant already punished in a criminal proceeding from having a nonremedial civil sanction imposed against him in a separate proceeding, the Court found the *Halper* method of determining whether a civil sanction is punitive to be inapplicable to tax statutes. *Id.* at 1944-45. Instead, focusing on a number of specific characteristics of the tax — its high rate, its deterrent purpose, the fact that it is conditioned on the commission of a crime, the limitation of

its scope to taxpayers who have already been arrested for the very conduct that gives rise to the tax obligation, and the fact that it is levied on goods that the taxpayer no longer owns or possesses — the Court concluded that the tax is fairly characterized as punishment. *Id.* at 1946-48.

Resolution of McGlory's double jeopardy claim regarding the civil forfeitures requires answers to three distinct questions: Was McGlory "in jeopardy" in the first forfeiture proceeding? Did the forfeitures under § 881(a)(6) constitute "punishment"? And finally, did the offenses underlying the first forfeiture and McGlory's criminal conviction represent the "same offense" as those underlying either of the two later forfeitures?[13]

B.

As noted in Part I *supra*, McGlory did not file any claim of ownership or answer to the complaint of forfeiture in either of the first two civil forfeiture proceedings. He did not participate in either proceeding until default judgments had already been entered against him. His first appearance in either proceedings was the filing of a motion to set aside the default judgment, in each case some four years after the judgment had been entered.

A forfeiture proceeding in which a party does not participate does not place that party in jeopardy, and therefore that party cannot use that forfeiture as the basis

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13. Another issue presented by any double jeopardy claim is whether the proceedings in which punishment has allegedly been imposed were separate proceedings or, alternatively, constituted a single, coordinated proceeding; if the latter is true, the double jeopardy argument fails. *See, e.g., Kurth Ranch*, 114 S. Ct. at 1945 ("Montana could no doubt collect its tax . . . if it had assessed the tax in the same proceeding that resulted in [the taxpayer's] conviction."); *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."). We assume without deciding that the various forfeiture proceedings and McGlory's criminal trial were all separate proceedings.

of a double jeopardy challenge to a subsequent proceeding. As the Seventh Circuit stated in *United States v. Torres*, 28 F.3d 1463, (7th Cir.) (holding that a forfeiture under 21 U.S.C. § 881(a)(6) in which the claimant did not file a claim did not place the claimant in jeopardy for Fifth Amendment purposes), *cert. denied*, 115 S. Ct. 669 (1994): "You can't have double jeopardy without a former jeopardy." *Id.* at 1465 (citing *Serfass v. United States*, 420 U.S. 377, 389 (1975)); *see also United States v. Penny*, 60 F.3d 1257 (7th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. ___ (U.S. Oct. 24, 1995) (No. 95-6698).

In *United States v. Arreola-Ramos*, 60 F.3d 188 (5th Cir. 1995), the Fifth Circuit followed the reasoning of *Torres* in rejecting the double jeopardy claim of a defendant who had not participated in an earlier administrative forfeiture proceeding. "As Arreola did not appear and contest the forfeiture, he was never in jeopardy," the court reasoned. "Without former jeopardy, double jeopardy cannot arise." *Id.* at 192. Because of the factual similarity between *Arreola-Ramos* and the present case, the Fifth Circuit's description and dismissal of the defendant's legal theory bear quoting:

> [W]e perceive that Arreola's argument runs something like this: (1) the government arrested me and seized my money; (2) knowing I was in jail, the government instituted forfeiture proceedings against my money, but sent notice only to my civil residence; and (3) this constitutes inadequate notice and violates my due process rights, as I was unaware of and unable to contest the forfeiture. Arreola then jumbles all three parts together and, in a transparent bit of legal alchemy, attempts to transmute the "lead" of a civil forfeiture proceeding—in which he was not even a party—into the "gold" of former jeopardy. Essentially, Arreola . . . now asks us . . . to overlook his absence from the forfeiture proceeding and to hold—not merely "in spite of" his absence but indeed "because of" his absence—that former jeopardy attached in the forfeiture proceeding. Despite its ingenuity, this is nothing more than a garden variety flawed syllogism.

Arreola-Ramos, 60 F.3d at 190.

In *United States v. Baird*, 63 F.3d 1213 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995) (No. 95-630), we also adopted the *Torres* rationale in rejecting the double jeopardy argument of a defendant who had not filed a claim in an earlier administrative forfeiture proceeding. In that case, defendant Baird sought dismissal of a superseding criminal indictment, arguing that it was barred by the Double Jeopardy Clause in light of the earlier forfeiture. We found Baird's argument wanting, stating: "Like the double jeopardy claimant in *Torres*, as a non-party to the administrative forfeiture process, Baird was not, and could not have been, placed at risk by that process." *Id.* at 1219. While *Halper* "extended the no-double-punishments rule to civil penalties . . . [it] did not remove from the double jeopardy claimant's shoulders the burden of establishing a former jeopardy." *Id.*

The logic of *Baird* applies as well to judicial forfeiture proceedings such as that brought against the $14K and the statues. Thus, we hold that McGlory was not "in jeopardy" in either of the first two forfeiture proceedings.[14]

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14. McGlory's only argument here would have to be that he did in fact participate in the first forfeiture proceeding by filing his motion to set aside the default judgment. However, we have stated that "jeopardy does not, and cannot, attach until one is made a *party* to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence, and that, until such time, the constitutional double jeopardy prohibition can have no application." *Baird*, 63 F.3d at 1218 (emphasis in original). Under this definition, McGlory's double jeopardy claim fails, since until and unless the default judgment was set aside, McGlory was not "a party to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence." Alternative definitions offered by other courts of appeal are also of no help to McGlory in this regard. *See Torres*, 28 F.3d at 1465 (jeopardy attaches when evidence is first presented to trier of fact); *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995) (in nontrial proceeding ended by a consent judgment, jeopardy attaches when judge accepts stipulation of forfeiture and enters judgment of forfeiture), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345); *United States v. Kearns*, 61 F.3d 1422, 1428 (9th Cir. 1995) (jeopardy attaches no earlier than date on which defendant files answer to forfeiture complaint).

C.

In order to establish that his double jeopardy rights were violated, McGlory must also show that the forfeitures themselves constituted "punishment" under *Halper*, *Austin*, and *Kurth Ranch*. Two courts of appeal have addressed this issue with respect to § 881(a)(6), reaching opposite conclusions. Adopting the Fifth Circuit's reasoning and rejecting the Ninth Circuit's, we hold that the forfeitures here did not constitute "punishment."

In *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994), the Fifth Circuit held that forfeiture of illegal drug proceeds under § 881(a)(6) is not "punishment." Applying the test of *Halper* — whether the amount forfeited was so great that it bore "no rational relation to the costs incurred by government and society from the defendant's criminal conduct," *id.* at 298-99, and citing national statistics on revenues produced and costs imposed by illegal drug activities, the court held that the amounts confiscated in that case were not grossly disproportionate to governmental and societal costs. *Id.* at 299. The court distinguished *Austin*, reasoning that the concerns about forfeitures of conveyances and real estate under §§ 881(a)(4) and (a)(7), i.e., that they could be wildly disproportionate to the costs imposed by the defendant's illegal activities, were not applicable to forfeitures of proceeds under § 881(a)(6). "[T]he forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale." *Id.* at 300.

Alternatively, the court held, even without the "rational relation" test of *Halper*, forfeiture of illegal drug proceeds is not "punishment" because of their very nature as illegally derived property. "When . . . the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. . . . The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the

law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." *Tilley*, 18 F.3d at 300.

We find the Fifth Circuit's reasoning to be sound. We therefore hold that the forfeiture under 21 U.S.C. § 811(a)(6) of proceeds from illegal drug transactions, or proceeds traceable to such transactions, does not constitute "punishment" within the meaning of the Double Jeopardy Clause.

In so holding, we reject the contrary reasoning and conclusion of the Ninth Circuit regarding § 881(a)(6) in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346). Eschewing the case-by-case approach urged by the government (and adopted by the Fifth Circuit in *Tilley*), the Ninth Circuit looked to "the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit." *Id.* at 1220; *see also id.* (citing *Austin* and *Kurth Ranch* as compelling a "categorical approach" under which a court "must look to the requirements of the forfeiture *statute* as a whole"). It noted that the scope of § 881(a)(6) was not limited to proceeds, but included all moneys " 'furnished or *intended to be furnished*' " in exchange for drugs, and all moneys " 'used or *intended to be used*' " to facilitate violations of the drug statute. *Id.* at 1221 (emphases in opinion). The panel's reasoning was sharply criticized in a seven-judge opinion dissenting from the court's denial of rehearing and of rehearing en banc:

> The panel's opinion collapses *Halper* [a double jeopardy case] into *Austin* [an excessive fines case], converting *Halper*'s rule of reason for the "rare" case into a per se rule for the routine case. It also merges the inquiry for excessive fines cases—whether the amount forfeited is partly punishment—into double jeopardy cases, where the issue is whether the amount forfeited is entirely punishment. And, perhaps most critically, the opinion treats *proceeds*, which are forfeitable under § 881(a)(6), like a car or

> a house used to facilitate a drug offense. This has to be wrong. *89 Firearms*—which *Austin* distinguishes but leaves intact—says otherwise; and so does the Fifth Circuit . . . .

$405,089.23 U.S. Currency, 56 F.3d at 42-43 (Rymer, J., dissenting).

D.

Moreover, both of McGlory's double jeopardy claims must also fail for an additional reason: the challenged forfeitures were not predicated on the "same offense" as that which formed the grounds for the earlier forfeiture or his criminal conviction.[15]

The basic test for determining whether two offenses are the "same offense" for double jeopardy purposes is the "same elements" test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[16] The *Blockburger* "same

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15. Since *Halper* was decided in 1989, no court of appeals has dealt squarely with the "same offense" issue in connection with § 881(a)(6). Several courts of appeals have addressed the issue tangentially, or with respect to a different provision of § 881. *See United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) (analyzing § 881(a)(7)), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345); *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1211 (9th Cir. 1994), *amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346) (distinguishing case at bar from *Hunter*); *United States v. One 1978 Piper Cherokee Aircraft, Tail No. N 5538V, Including Its Tools and Appurtenances*, 37 F.3d 489 (9th Cir. 1994) (remanding for consideration of "same offense" issue under § 881(a)(4)). *But see United States v. Sherrett*, 877 F. Supp. 519, 527 (D. Or. 1995) (holding that indictment and forfeiture under § 881(a)(6) were based on same offense where indictment included conspiracy count and forfeiture complaint included "allegations of conspiracy").

16. The Supreme Court clarified the applicability of the *Blockburger* test in *Missouri v. Hunter*, 459 U.S. 359 (1983), where the Court

elements" test was confirmed in *United States v. Dixon*, 113 S. Ct. 2849 (1993), which rejected the alternative "same conduct" test in overruling *Grady v. Corbin*, 495 U.S. 508 (1990).

Here, all three forfeiture complaints sought forfeiture "pursuant to 21 U.S.C. §881." App. 11, 14, 17. The government supported its complaint against the 14K and the 184K with allegations that they were "proceeds from sales or exchanges of controlled substances, in violation of Title 21, United States Code." App. 12, 18. This language implicitly invoked § 881(a)(6). Regarding the statues, the government alleged that they were "acquired with proceeds traceable to unlawful exchanges of controlled substances in violation of 21 U.S.C. §881(a)(6)." App. 15.[17] Our analysis thus must begin with the language of § 881(a)(6):

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characterized the test as a rule of statutory construction that bars cumulative punishments for the same offense "'*in the absence of a clear indication of contrary legislative intent.*'" *Blockburger*, 459 U.S. at 366 (quoting *Whalen v. United States*, 445 U.S. 684, 692 (1980)) (emphasis in *Blockburger*). Thus,

> [w]here . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. at 368-69. The *Hunter* limitation on the scope of *Blockburger* would apply in the present appeal only if the civil and criminal proceedings were considered a single, coordinated proceeding rather than separate proceedings. *See* Part III.B *supra*.

17. This level of specificity in the forfeiture complaints eliminates the need to undertake a detailed examination of indictments, affidavits, etc. of the sort conducted by the court in *United States v. Allemen*, 893 F. Supp. 888 (N.D. Cal. 1995). There the court was faced with vague seizure notices that simply noted that the defendant's money was seized "for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used '[in] or acquired as a result of a **drug related offense**.'" *id.* at 905 (emphasis in original), and had to determine whether the forfeitures were based on the same offenses as those charged in the criminal indictments, all of which were drug-related.

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6). Thus, proceeds from, or proceeds traceable to, exchanges of controlled substances in violation of "this subchapter" are subject to forfeiture. "This subchapter" is subchapter I of Title 21, covering 21 U.S.C. §§ 801-904. In addition, section 965 makes the forfeiture provision applicable to violations of subchapter II, 21 U.S.C. §§ 951-971. 21 U.S.C. § 965; *see also United States v. Sherrett*, 877 F. Supp. 519, 525-26 (D. Or. 1995). Therefore, forfeiture under section 881(a)(6) can punish a property owner only for violations of 21 U.S.C. §§ 801-971.

A *Blockburger/Dixon* analysis of the three forfeitures is straightforward: each forfeiture requires proof of an element that the others do not require, i.e., that the particular piece of property seized constituted illegal proceeds or was acquired with illegal proceeds. McGlory's assertions notwithstanding, the three forfeitures among themselves do not satisfy the "same elements" test.

We must also apply the *Blockburger/Dixon* test to the offenses underlying the third forfeiture (the $184K) and those underlying McGlory's criminal punishment, since this last forfeiture followed the criminal conviction. Of the criminal charges for which McGlory was indicted and convicted, only two fall within the range of violations covered by section 881(a)(6): conspiracy to possess with intent to distribute, and to distribute, heroin, in violation of

21 U.S.C. § 846; and possession of heroin with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). *See United States v. McGlory*, 968 F.2d 309, 314-15 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1388 (1993). As noted above, the forfeitures were based on the allegations that the seized property was "proceeds from sales or exchanges of controlled substances" or "acquired with proceeds traceable to unlawful exchanges of controlled substances."

Under the *Blockburger/Dixon* test, the violations underlying the forfeitures and those for which McGlory was convicted also do not constitute the "same offenses." Conviction on the criminal charges required proof that McGlory participated in a conspiracy or that he possessed a controlled substance (namely, heroin); forfeiture under § 881(a)(6) did not require proof of either of these elements. Similarly, forfeiture required proof of a sale or exchange, and proof that the specific property was proceeds of, or traceable to, a sale or exchange; neither of the criminal charges required proof of either of these elements.[18]

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18. *Halper* and *Kurth Ranch* provide a useful contrast to the present case. The criminal and civil charges against Halper were both based on his submission of the 65 false Medicare claims. The criminal false claims statute, 18 U.S.C. § 287, prohibited "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent." The civil False Claims Act, 31 U.S.C. § 3729, prohibited "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." *See Halper*, 490 U.S. at 437-38.

The statute at issue in *Kurth Ranch* imposed a tax on the possession and storage of dangerous drugs. *See Kurth Ranch*, 114 S. Ct. at 1941. Thus, it was "conditioned on the commission of a crime." *Id.* at 1947. Moreover, the Court explained: "In this case, the tax assessment not only hinges on the commission of a crime, it is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." *Id.* Thus, while neither *Halper* nor *Kurth Ranch* explicitly addressed the "same offense" issue, it seems clear that in both cases application of the *Blockburger/Dixon* test would have shown that both punishments were based on the same offense.

IV.

For the reasons stated above, we reverse and remand the orders of the district court in Nos. 94-3674 and 94-3675, and affirm the order of the district court in No. 94-3528.[19]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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19. Judge Sloviter concurs with all of this opinion except for section III.D. Neither party has briefed the "same offense" issue, and the district court, which did not discuss the double jeopardy issue at all, obviously never addressed this particular issue. Under these circumstances I would leave that issue for another day.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 89-2323

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

$184,505,01, IN UNITED STATES CURRENCY,

Defendant

REGINALD D. MCGLORY,

Claimant.

ORDER

AND NOW, this 8th day of August, 1994, for the reasons articulated in the United States' Brief in Opposition (Docket No. 24), Claimant Reginald D. McGlory's Motion to Set Aside Entry of Default and Motion To Set Aside Default Judgment is hereby DENIED.

BY THE COURT,

D. BROOKS SMITH
D. Brooks Smith
United States District Judge

cc:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3528

UNITED STATES OF AMERICA

—v.—

$184,505.01 IN U.S. CURRENCY

Reginald D. McGlory,

Claimant-Appellant

No. 94-3674

UNITED STATES OF AMERICA

—v.—

$14,548.50 IN U.S. CURRENCY

Reginald D. McGlory,

Claimant-Appellant

No. 94-3675

UNITED STATES OF AMERICA

—v.—

ONE MARBLE INDIAN STATUE,
ONE REPLICA REMINGTON RATTLESNAKE STATUE

Reginald D. McGlory,

Claimant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Nos. 89-cv-2323, 90-cv-236 & 90-cv-369)

Present: SLOVITER, *Chief Judge;* ALITO, *Circuit Judge*; and,
RENDELL, *District Judge**

---

* The Honorable Marjorie O. Rendell, District Judge for the Eastern District of Pennsylvania sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel September 13, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court at W.D.No. 89-cv-02323 (Appeal No. 94-3528) entered August 10, 1994, be, and the same is hereby affirmed. It is further order and adjudged that the judgments at W.D.No. 90-0236 (Appeal No. 94-3674) entered November 15, 1994, and W.D. No. 90-0369 (Appeal No. 94-3675 entered November 15, 1994, be and the same are hereby reversed and the cause remanded to the said District Court for such further proceedings as may be consistent with the opinion of this Court. Costs taxed against McGlory in 94-3528 and in favor of McGlory in Nos. 94-3674 and 94-3675. All of the above in accordance with the opinion of this Court.

ATTEST:

P. DOUGLAS [ILLEGIBLE]
Clerk

Dated: December 29, 1995

Supreme Court, U.S.
FILED
JUN 24 1996
CLERK

No. 95-1575

In the Supreme Court of the United States

OCTOBER TERM, 1995

REGINALD D. MCGLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities when the owner of the property has previously been prosecuted for, and convicted of, narcotics and money laundering crimes.

2. Whether petitioner's failure to file a claim in two forfeiture proceedings precludes a finding that he was placed in jeopardy or suffered punishment as a result of those forfeitures.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1575

REGINALD D. MCGLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 72 F.3d 1160.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1995. The petition for a writ of certiorari was filed on March 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846; possessing heroin with intent to distribute it, in violation of 21

U.S.C. 841(a)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and laundering drug proceeds, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Pet. App. 4a; Gov't C.A. Crim. Br. 6. He was sentenced to life imprisonment. See *United States* v. *McGlory*, 968 F.2d 309, 315 (3d Cir.), cert. denied, 506 U.S. 956, 1009 (1992), and 507 U.S. 962 (1993). The court of appeals affirmed. *Ibid.*

Meanwhile, the United States filed a complaint for civil forfeiture of $184,505.01 on November 21, 1989; a complaint for civil forfeiture of $14,584.50 on February 7, 1990; and a complaint for civil forfeiture of various statues on February 28, 1990. Pet. App. 4a-5a.[1] The district court entered a default judgment in each proceeding. *Id.* at 5a. The district court subsequently denied petitioner's motions to set aside the default judgments. *Ibid.* The court of appeals affirmed with respect to the $184,505.01, but reversed with respect to the other two forfeitures. *Id.* at 1a-21a.

1. On September 8, 1989, as part of a criminal investigation of petitioner, federal officials executed a search warrant at an address on Bryn Mawr Road in Pittsburgh, where petitioner was believed to reside. Pet. App. 3a, 5a-6a n.7; Gov't C.A. Civ. Br. 7 & n.1. Government agents seized narcotics paraphernalia containing heroin residue. *McGlory*, 968 F.2d at 320. The government also seized $14,584.50 in cash, some

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[1] The court of appeals refers to "three" statues. Pet. App. 3a. From the Complaint for Forfeiture, however, it appears that only two statues were involved. C.A. Civ. App. 14; see Pet. App. 1a (caption).

statues, and a separate collection of $184,505.01 in cash. Pet. App. 3a-4a. The United States began separate administrative forfeiture proceedings against the $14,584.50 and the statues. *Id.* at 4a. Petitioner's wife and mother filed administrative claims to the $14,584.50 and the statues, respectively. *Ibid.* Those forfeitures were then referred to the United States Attorney, who filed civil forfeiture complaints on February 7, 1990, for the $14,584.50 and on February 28, 1990, for the statues. *Ibid.* The government served petitioner with the two forfeiture complaints at the Bryn Mawr Road address. *Ibid.*

The $184,505.01 in cash was referred initially to the United States Attorney to initiate judicial forfeiture proceedings, because it exceeded the $100,000 maximum for administrative forfeiture. Pet. App. 4a n.5. On November 21, 1989, the United States filed a civil forfeiture complaint for the $184,505.01. *Id.* at 5a. Petitioner was served with the complaint at the Bryn Mawr Road address, and his criminal attorney was also served. *Ibid.*

Meanwhile, on October 4, 1989, petitioner was indicted. C.A. Civ. Supp. App. 186. The jury trial in petitioner's criminal case began on April 25, 1990. *Id.* at 200. Petitioner was convicted on May 16, 1990 (*id.* at 201) and was sentenced to life imprisonment on February 12, 1991 (*id.* at 206).

Petitioner failed to file a claim or answer in any of the three civil forfeiture actions. Pet. App. 5a. Default judgments were entered against petitioner for the $14,584.50 and the statues on May 29, 1990, and July 23, 1990, respectively. *Ibid.* Petitioner moved to set aside those default judgments on April 21, 1994. Gov't C.A. Civ. Br. 6. The district court denied those motions on November 14, 1994. *Ibid.*

On March 26, 1990, the government obtained a default judgment for the $184,505.01. Pet. App. 5a; C.A. Civ. Supp. App. 111. Petitioner's attorney then filed a claim of ownership for petitioner and a motion to set aside the default judgment for the $184,505.01. Pet. App. 5a. The district court set aside that default judgment. *Ibid.* When petitioner again failed to file an answer to the forfeiture complaint, however, the court entered another default judgment on April 12, 1991. *Ibid*; Gov't C.A. Civ. Br. 5. Petitioner moved to set aside that default judgment on July 15, 1994. Pet. App. 5a. The court denied that motion on August 8, 1994. *Ibid*; Gov't C.A. Civ. Br. 5.

2. On appeal, petitioner contended that the government had violated his due process rights by failing to provide him with adequate notice of the civil forfeiture proceedings against the $14,584.50 and the statues. Pet. App. 5a. The court of appeals agreed, stating that the government was required to "make an attempt to serve [petitioner] with notice of the forfeiture proceedings in prison." *Id.* at 6a. Although petitioner had received notice of the administrative forfeitures while in prison, the court of appeals determined that he had not received adequate notice of the subsequent judicial proceedings. *Id.* at 7a. The court of appeals added that for purposes of the civil forfeiture proceedings against the $14,584.50 and the statues, service on petitioner's criminal attorney was not adequate to constitute actual notice to petitioner. *Id.* at 8a.

Petitioner also contended that because the forfeitures of the statues and the $184,505.01 came after the forfeiture of the $14,584.50, and because the forfeiture of the $184,505.01 came after jeopardy had attached in petitioner's criminal case, those for-

feitures constituted multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the Fifth Amendment. Pet. App. 8a.[2] The court of appeals rejected petitioner's double jeopardy argument on three grounds.

First, the court of appeals held that because petitioner had never filed a claim in the forfeiture proceedings against the $14,584.50 and against the statues, he was never placed "in jeopardy" in those proceedings. Pet. App. 12a-14a. Relying on decisions rejecting the double jeopardy claims of defendants who had not participated in earlier administrative forfeitures, the court of appeals held that the logic of those cases extended to the claims of parties who do not participate in judicial forfeiture proceedings. *Ibid.* See *United States* v. *Torres*, 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994); *United States* v. *Arreola-Ramos*, 60 F.3d 188 (5th Cir. 1995); *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996).

Second, the court of appeals held that none of the forfeitures constituted "punishment" under the multiple punishments prong of the Double Jeopardy Clause. Pet. App. 15a-17a. The court adopted (*id.* at 15a) the reasoning of *United States* v. *Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994), while "reject[ing] the contrary reasoning and conclusion of the Ninth Circuit" in *United States* v. *$405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (No. 95-346) (argued Apr. 17, 1996). Pet. App. 16a.

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[2] The relevant dates for the court of appeals' double jeopardy discussion are set forth in Pet. App. 8a-9a n.11.

Finally, the court of appeals applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), and *United States* v. *Dixon*, 509 U.S. 688 (1993), and determined that the challenged forfeitures were not based on the "same offense" as petitioner's criminal conviction. Pet. App. 17a-20a. The court explained that the criminal conviction required proof that petitioner had participated in a conspiracy or that he possessed a controlled substance, but that the forfeitures under 21 U.S.C. 881(a)(6) did not require proof of either of those elements. Pet. App. 20a. Conversely, the forfeitures, unlike the criminal conviction, required proof of a sale or exchange and proof that the forfeited property "was proceeds of, or traceable to, a sale or exchange." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 7-16) that the civil forfeiture of his property violated his double jeopardy rights. The proceedings in the court of appeals involved three distinct forfeitures: (a) the forfeiture of $14,584.50 in cash, (b) the forfeiture of two or three statues (see note 1, *supra*), and (c) the forfeiture of $184,505.01 in cash. Only the last of those forfeitures, however, is directly at issue in this Court. The court of appeals reversed the judgments of the district court with respect to the first two forfeitures on the ground that the government had failed to provide petitioner with adequate notice, and the United States has not sought further review of that aspect of the court of appeals' decision.

The court of appeals affirmed the forfeiture of the $184,505.01, however, on the grounds that (1) the forfeiture did not constitute "punishment" under the multiple punishments prong of the Double Jeopardy

Clause, see *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969); and (2) the forfeiture was not based on the "same offense" as petitioner's criminal conviction. See Pet. App. 15a-20a. As petitioner points out (Pet. 8), those issues are currently before the Court in *United States* v. *Ursery*, No. 95-345 (argued Apr. 17, 1996), and *United States* v. *$405,089.23 in United States Currency*, No. 95-346 (argued Apr. 17, 1996). The petition for a writ of certiorari should therefore be held pending the Court's decisions in *Ursery* and *$405,089.23*, and disposed of as appropriate in light of those decisions.[3]

2. Petitioner also challenges (Pet. 19-23) the court of appeals' conclusion that "[a] forfeiture proceeding in which a party does not participate does not place that party in jeopardy, and therefore that party cannot use that forfeiture as the basis of a double jeopardy challenge to a subsequent proceeding." Pet. App. 12a-13a. Consistent with the analysis of the Third Circuit in the instant case, every court of appeals that has considered the issue has held that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result

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[3] The Court's resolution of *Ursery* and *$405,089.23* may also have an indirect effect on petitioner's interests in the $14,584.50 in cash and the statues that were the subjects of the other two forfeiture proceedings. Although the court of appeals reversed the judgments of forfeiture with respect to those items, its decision would appear to leave open the possibility that the government could initiate new forfeiture proceedings against those properties, so long as proper notice is given. Were this Court to decide *Ursery* and *$405,089.23* adversely to the government, however, its decision could preclude the government from initiating new forfeiture proceedings against those properties.

of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir.), cert. denied, No. 93-8843 (June 3, 1996); *United States* v. *Sykes*, 73 F.3d 772 (8th Cir.), cert. denied, No. 95-1824 (June 3, 1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), cert. denied, No. 95-7955 (June 17, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).[4] This Court has recently denied several petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause.[5]

In any event, the court of appeals' analysis of this issue did not affect its ultimate disposition of the case. With respect to the forfeitures of the $14,548.50 and the statues, the court reversed the district court judgments on the ground that petitioner had failed to receive adequate notice. In affirming the judgment of forfeiture of the $184,505.01, the court did not treat that forfeiture as uncontested, presumably because petitioner did file a claim of ownership to that money (though he subsequently failed to file an answer to

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[4] The government's argument on this issue is set forth in greater detail in (*inter alia*) our brief in opposition to the petition for a writ of certiorari filed in *Plunk* v. *United States*, No. 95-1243 (cert. denied May 13, 1996). We have provided counsel for petitioner with a copy of our brief in *Plunk*.

[5] See, *e.g.*, *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, 116 S. Ct. 1357 (1996); *Menken* v. *United States*, No. 95-1036 (May 13, 1996); *Plunk* v. *United States*, No. 95-1243 (May 13, 1996).

the forfeiture complaint within the time allotted by the district court). See Pet. App. 5a, 8a-9a n.11, 12a, 14a. The court of appeals' affirmance of the district court was based instead on its conclusions that the forfeiture "did not constitute 'punishment'" for purposes of double jeopardy analysis, *id.* at 15a, and that it was not "predicated on the 'same offense' as that which formed the grounds for the earlier forfeiture or [petitioner's] criminal conviction," *id.* at 17a.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23 in United States Currency*, No. 95-346, and disposed of as appropriate in light of the Court's decisions in those cases.

Respectfully submitted.

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